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99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-687

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ORIGINAL

HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986

COMPLETED

JULY 16, 1986.—Ordered to be printed

Mr. HAWKINS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 415]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 415), to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Handicapped Children's Protection Act of 1986".

AWARD OF ATTORNEYS' FEES

SEC. 2. Section 615(e)(4) of the Education of the Handicapped Act is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following new subparagraphs:

"(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

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"(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

"(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

"(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

"(ii) the offer is not accepted within ten days; and

"(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

"(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

"(F) Whenever the court finds that—

"(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

"(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

"(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

"(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of this Act.".

EFFECT OF EDUCATION OF THE HANDICAPPED ACT ON OTHER LAWS

SEC. 3. Section 615 of the Education of the Handicapped Act is amended by adding at the end thereof the following new subsection:

"(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.".

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GAO STUDY OF ATTORNEYS' FEES PROVISION

SEC. 4. (a) The Comptroller General of the United States, through the General Accounting Office, shall conduct a study of the impact of the amendments to the Education of the Handicapped Act made by section 2 of this Act. Not later than June 30, 1989, the Comptroller General shall submit a report containing the findings of such study to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate. The Comptroller General shall conduct a formal briefing for such Committees on the status of the study not later than March 1, 1988. Such report shall include the information described in subsection (b).

(b) The report authorized under subsection (a) shall include the following information:

(1) The number, in the aggregate and by State, of written decisions under section 615 (b)(2) and (c) transmitted to State advisory panels under section 615(d)(4) for fiscal years 1984 through 1988, the prevailing party in each such decision, and the type of complaint. For fiscal year 1986, the report shall designate which decisions concern complaints filed after the date of the enactment of this Act.

(2) the number, in the aggregate and by State, of civil actions brought under section 615(e)(2), the prevailing party in each action, and the type of complaint for fiscal years 1984 through 1988. For fiscal year 1986 the report shall designate which decisions concern complaints filed after the date of enactment.

(3) Data, for a geographically representative selective sample of States, indicating (A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party, in each action and proceeding under section 615(e)(4)(B) from the date of the enactment of this Act through fiscal year 1988, and the range of such fees, costs, and expenses awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency.

(4) Data, for a geographically representative sample of States, on the experience of educational agencies in resolving complaints informally under section 615(b)(2), from the date of the enactment of this Act through fiscal year 1988.

EFFECTIVE DATE

SEC. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill, and agree to the same.

AUGUSTUS F. HAWKINS,
MARIO BIAGGI,
PAT WILLIAMS,

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CHARLES A. HAYES,
MATTHEW G. MARTINEZ,
DENNIS E. ECKART,
Managers on the Part of the House.

ORRIN HATCH,
LOWELL P. WEICKER, JR.,
DON NICKLES,
TED KENNEDY,
JOHN F. KERRY,
Managers on the Part of the Senate.

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 415) to authorize the award of attorneys' fees to certain prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report. The differences between the Senate bill and the House amendment and the substitute agreed to in the conference, are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

1. The Senate bill provides for "a reasonable attorney's fee."

The House amendment provides for "reasonable attorneys' fees."

The Senate recedes.

2. With slightly different wording, both the Senate bill and the House amendment provide for the awarding of attorneys' fees in addition to costs.

The Senate recedes to the House and the House recedes to the Senate with an amendment clarifying that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs . . ." This change in wording incorporates the Supreme Court *Marek* v. *Chesny* decision (87 L. Ed. 2d 1).

The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.

3. The Senate bill provides for the award of attorney's fees "to a parent or legal representative."

The House amendment provides for the award of attorneys' fees "to the parents or guardian."

The Senate recedes.

4. The Senate bill limits the amount of the fee awarded whenever a parent or legal representative is represented by a publicly funded organization which provides legal services.

The House amendment provides that fee awards shall be based on prevailing rates in the community.

The House recedes to the Senate and the Senate recedes to the House with an amendment clarifying that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of

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services furnished." See, *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Marek* v. *Chesny*, 87 L. Ed 2d 1 (1985); and *Blum* v. *Stenson*, 104 S. Ct. 1541 (1984). However, no such awards of attorneys' fees shall be calculated by using bonuses or multipliers. The conferees want to make it clear that the inclusion of the prohibition against calculation of fees using bonuses and multipliers is limited to cases brought only under part B of the Education of the Handicapped Act. The conferees do not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. 1988. See, *Hensley* v. *Eckerhart*, *Blum* v. *Stenson*, *Evans* v. *Jeff D.*, 106 S. Ct. 1531 (1986). In addition, several new sections would be added to clarify that under part B of the Education of the Handicapped Act, no award of attorneys' fees and related costs subject to the provision of the act may be made for services performed subsequent to the time a written offer of settlement is made to a party (if the offer is made at least 10 days prior to the date of the action or proceeding) if the offer is not accepted within ten days and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the parent or guardian than the offer of settlement. However, attorneys' fees may be awarded to a prevailing parent or guardian who was substantially justified in rejecting the settlement offer. Furthermore, the court shall reduce accordingly the amount of attorneys' fees and related expenses otherwise allowable if they determine that:

(1) the parent or guardian, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy;

(2) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience and reputation; or

(3) the time spent and legal services furnished were excessive considering the nature of the action or proceeding.

Finally, the preceding situations in which the court reduces the amount of fees and related expenses otherwise allowable shall not apply if the local or state educational agency is determined to have unreasonably protracted the final resolution of the action or proceeding or if a violation of section 615 of the Education of the Handicapped Act is found.

The conferees intend that this provision clarify the application of the *Marek* v. *Chesny* decision to the Handicapped Children's Protection Act. One exception is made to the applicability of the *Marek* v. *Chesny* decision. When the parent or guardian is substantially justified in rejecting the settlement offer, the *Marek* v. *Chesny* decision would not apply. Substantial justification for rejection would include relevant pending court decisions which could have an impact on the case in question.

In enumerating three conditions under which the amount of attorneys' fees would be reduced, the committee intends to protect against excessive reimbursement. The second condition is a codification of the policy for awarding fees in footnote 11 of *Blum* v. *Stenson*.

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5. The House amendment, but not the Senate bill, specifies that fees, expenses, and costs awarded to the prevailing party may not be paid with the funds provided under part B of EHA. The report accompanying the Senate's bill restates existing policy that bars the payment of such fees and the costs under part B.

The House recedes. The conferees wish to emphasize that existing law bars payment of attorneys' fees with funds appropriated under B of EHA.

6. The House amendment, but not the Senate bill, provides for a GAO study of the impact of the bill authorizing the awarding of fees and costs.

The Senate recedes to the House with an amendment expanding the data collection requirements of the GAO study to include information regarding the amount of funds expended by local educational agencies and state educational agencies on civil actions and administrative proceedings.

7. The House amendment, but not the Senate bill, sunsets the court's authority to award fees at the administrative level after a period of time specified in the legislation.

The House recedes.

8. With slightly different wording, both the Senate bill and the House amendment authorize the filing of civil actions under legal authorities other than part B of EHA so long as parents first exhaust administrative remedies available under part B of EHA to the same extent as would be required under that part.

The House recedes. It is the conferees' intent that actions brought under 42 U.S.C. 1983 are governed by this provision.

9. The House amendment, but not the Senate bill, requires public access to hearing decisions.

The House recedes. The conferees wish to emphasize that public access to hearing decisions is existing law.

10. The House amendment, but not the Senate bill, requires that the public educational agency provide parents with an opportunity to meet informally in an attempt to resolve a complaint.

The House recedes.

11. The House amendment, but not the Senate bill, includes an anti-retaliation provision.

The House recedes. It is the conferees' intent that no person may discharge, intimidate, retaliate, threaten, coerce, or otherwise take an adverse action against any person because such person has filed a complaint, testified, furnished information, assisted or participated in any manner in a meeting, hearing, review, investigation, or other activity related to the administration of, exercise of authority under, or right secured by part B of EHA. The term "person" the first time it is used means a state educational agency local educational agency, intermediate educational unit or any official or employee thereof.

12. The House amendment, but not the Senate bill, makes retroactive its provision regarding the effect of EHA on other laws (section 3).

The House recedes.

AUGUSTUS F. HAWKINS,
MARIO BIAGGI,
PAT WILLIAMS,

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